Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in Volume 120, Federal Reporter, Second Series, at page 393, and appears in the record at pages 206 to 225. The District Judge, upon overruling petitioner's Motion for New Trial, delivered a memorandum opinion which is set forth at page 192 of the record.

II.

STATEMENT OF THE CASE.

Under the heading "Summary Statement of the Matter Involved" in the petition, *ante*, is a statement of the case in sufficient detail for the purposes here involved, and, in the interest of brevity, the statement is not here repeated.

III.

SPECIFICATION OF ERRORS.

(a) The Ciruit Court of Appeals erred in holding that under the evidence W. R. Evans, Manager of respondent's Kansas City, Missouri, office, was without authority to confirm the validity of the guaranty bond for and in behalf of respondent, and by so holding, the Circuit Court of Appeals decided an important question of local law in a manner in direct conflict with the decision of the Supreme Court of Missouri in the case of *James H. Forbes Tea & Coffee Co.* v. *Baltimore Bank,* 345 Mo. 1151.

(b) The Circuit Court of Appeals erred in holding that the declarations of W. R. Evans, Manager of respondent's office in Kansas City, Missouri, were inadmissible because violative of the hearsay rule, and by so holding, the Circuit Court of Appeals decided an important question of local law in a manner in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of *Shelton* v. *Wolf Cheese Co.,* 338 Mo. 1129; *Whittington* v. *Westport Hotel Operating Co.,* 326 Mo. 1117; *Philibert* v. *Benjamin Ansehl Co.,* 342 Mo. 1239; *Simpson Adv. Service Co.* v. *Manufacturers & Merchants Ass'n,* 330 Mo. 1049; and *State* v. *Armour Packing Co.,* 173 Mo. 356.

(c) The Circuit Court of Appeals erred in holding that the introduction into evidence by respondent of the genuine signature of L. Bert Nye, the person who pur-

portedly signed the guaranty bond, did not present a question for the jury in respect to the genuineness of said guaranty bond, and by so holding the Circuit Court of Appeals decided an important question of local law in a manner in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of *Sanders* v. *North End Building & Loan Ass'n,* 178 Mo. 674; *State* v. *Thompson,* 141 Mo. 408; and *State* v. *Pace,* 269 Mo. 682, and in conflict with, and in violation of, the provisions of Section 1751, Missouri Revised Statutes, 1929, and rendered a decision violative of the federal statute in respect to proof of disputed writings (28 United States Code Annotated, Section 638).

(d) The Circuit Court of Appeals erred in holding that the burden of proof lay upon petitioner to prove the genuineness of the guaranty bond and, by so holding, rendered an opinion in conflict with, and in violation of, the provisions of Rule 8(c) of the Federal Rules of Civil Procedure.

IV.

SUMMARY OF ARGUMENT.

(a) The question presented involves the rights of the parties under a guaranty bond alleged to have been delivered in Missouri, to a resident of that state, and the controversy arises out of transactions occurring in Missouri. It is, therefore, a question of local law to be determined by applicable local decisions.

Ruhlin v. *New York Life Insurance Company,* 304 U. S. 202.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64.

(b) Under the law of Missouri, as announced by the highest court of that state, W. R. Evans, Manager of respondent's office in Kansas City, Missouri, had author-

ity, express or implied, to confirm the validity of the guaranty bond for and in behalf of respondent. Indeed, the record shows that respondent recognized that he possessed such authority.

James H. Forbes Tea & Coffee Company v. *Baltimore Bank*, 345 Mo. 1151.

Kelso v. *Lincoln National Life Ins. Co.*, 227 Mo. App. 184.

State v. *Hemenover*, 188 Mo. 381.

Thompson v. *Insurance Co.*, 169 Mo. 12.

James v. *Mutual Reserve Ins. Co.*, 148 Mo. 1.

Springfield Steam Laundry Co. v. *Traders' Ins. Co.*, 151 Mo. 90.

Bacon Piano Co. v. *Metcalf Jewelry & Music Co.*, 225 Mo. App. 463.

Buffalo Trust Co. v. *Producers' Exchange No. 148, California, Mo.*, 224 Mo. App. 199.

Robinson v. *Moark-Nemo, etc., Mining Co.*, 178 Mo. App. 531, 539.

Concrete & Steel Construction Co. v. *National Asphalt Refining Co.*, (Mo. App.) 2 S. W. 2d 157.

Farm & Home Savings & Loan Ass'n v. *Stubbs*, 231 Mo. App. 87.

(c) Under the law of Missouri, as announced by the highest court of that state, the declarations of W. R. Evans, Manager of respondent's Kansas City office, were admissible in evidence as proof of the execution of the guaranty bond by respondent and were not violative of the hearsay rule.

Shelton v. *Wolf Cheese Co.*, 338 Mo. 1129.

State v. *Armour Packing Co.*, 173 Mo. 356.

Whittington v. *Westport Hotel Operating Co.*, 326 Mo. 1117.

Philibert v. *Benjamin Ansehl Co.*, 342 Mo. 1239.

Green v. *American Life & Accident Ins. Co.*, (Mo. App.) 93 S. W. 2d 1119.

Simpson Advertising Service Co. v. *Manufacturers & Merchants Ass'n*, 330 Mo. 1049.

(d) Under the Missouri law, as well as the federal statutes, the introduction into evidence by respondent of a specimen of the genuine signature of L. Bert Nye required submission of the case to the jury.

Sec. 1751, Mo. R. S., 1929, Title 28, United States Code Annotated, Sec. 638.

Sanders v. *North End Building & Loan Ass'n*, 178 Mo. 674.

State v. *Pace*, 269 Mo. 682.

State v. *Thompson*, 141 Mo. 408.

(e) The Circuit Court of Appeals erred in holding that the burden of proof lay upon petitioner to prove the execution and delivery of the guaranty bond by respondent.

Federal Rules of Civil Procedure, Rule 8(c).

Fort Dodge Hotel Company v. *Bartelt*, (8th Cir.) 119 F. 2d 253.

Lampe v. *Franklin American Trust Co.*, 339 Mo. 361.

State ex rel. City of Maplewood v. *Southern Surety Co.*, 323 Mo. 150.

Campbell v. *Terminal R. Ass'n of St. Louis*, 126 S. W. 2d 915.

Cluck v. *Abe*, 328 Mo. 81.

Connole v. *E. St. Louis & S. Ry. Co.*, 340 Mo. 690.

State ex rel. Stevens v. *Arnold*, 326 Mo. 32.

McCloskey v. *Koplar*, 329 Mo. 527.

Clapper v. *Larkin*, 343 Mo. 710.

Downs v. *Horton*, 287 Mo. 414.

Bond v. *St. Louis-San Francisco Ry. Co.*, 315 Mo. 987.

(f) The decision of the Circuit Court of Appeals, if allowed to stand, would render the branch office system impractical in that local patrons could not rely upon the apparent authority of the manager, especially in respect to transactions arising outside the territory served by the office committed to his management.

V.

ARGUMENT.

(a)

The Question Presented Is One of Local Law.

The guaranty bond alleged to have been executed and delivered by respondent was acquired by petitioner in Missouri as a part of a transaction which occurred in that state. The jurisdiction of the District Court was based entirely upon diversity of citizenship between the parties with the requisite jurisdictional amount in controversy. The question presented is, therefore, one of local law to be determined by applicable local decisions. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202.

(b)

Under the Law of Missouri, W. R. Evans, As Manager of Respondent's Kansas City Office, Had Authority to Confirm the Validity of the Guaranty Bond.

On February 21, 1940, the Supreme Court of Missouri decided the case of *James H. Forbes Tea & Coffee Co.* v. *Baltimore Bank*, 345 Mo. 1151.

In that case, the facts briefly stated were that the appellant, James H. Forbes Tea & Coffee Company, a well-known importer of tea, coffee and spices, with its principal office in St. Louis, Missouri, and branch offices and warehouses in Kansas City, Missouri, and Omaha, Nebraska, had Fred Einhorn as manager of its Kansas City branch office.

On November 8, 1932, Einhorn presented to respondent, the Baltimore Bank in Kansas City, for deposit to his personal account, a check payable to appellant from the Rutherford Chile Company. A conversation took

place between Einhorn and the officers of the respondent bank when he offered the check for deposit, and two days later he procured from appellant's home office an instrument in respect to his authority, and presented it to respondent.[1] As time went on, Einhorn deposited to his personal account 174 checks payable to appellant, which totalled $41,675.80, and at various times sent to appellant his personal checks drawn on the respondent bank which aggregated at least $10,648.07.

After it had been discovered that Einhorn was short in his accounts, appellant collected $20,000 from the bonding company which wrote the fidelity bond on Einhorn, and then sued the respondent bank for conversion of 174 checks, aggregating $41,675.80.

The Supreme Court of Missouri held that appellant could not recover because Einhorn, as manager of appellant's office at Kansas City, had apparent, if not actual, authority to receive payment of checks made payable to

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[1]The instrument which Einhorn delivered to the bank was as follows:

"Jas H. Forbes Tea & Coffee Company, St. Louis-Omaha-Kansas City, 908 to 926 Clark Avenue, Saint Louis. November 10, 1932. To Whom It May Concern:

"This is to certify that Mr. Fred Einhorn, a resident of Kansas City, Mo., is authorized to receive payment of accounts due the Jas. H. Forbes Tea & Coffee Co., a Missouri corporation, with headquarters in St. Louis, Mo., and a branch office and warehouse at 302 Delaware St., Kansas City, Mo. It is further certified that Mr. Fred Einhorn is the Manager of the foregoing company's branch office and warehouse in Kansas City, Mo. Jas. H. Forbes Tea & Coffee Co., Herbert H. Droste, Secy.-Treas.

"Before me, a notary public in and for the City of St. Louis, on this day personally appeared Herbert H. Droste, who being by me duly sworn, upon oath says he is Secretary and Treasurer of the Jas. H. Forbes Tea & Coffee Co., a Missouri corporation. Herbert H. Droste. Subscribed and sworn to before me this 10th day of November, 1932. Hilma A. Barthel, Notary Public. (Seal) My commission expires January 7, 1935."

appellant and affirmed the ruling of the trial court sustaining a demurrer to the evidence.

In the course of the opinion it was said:

> *"The rule is well settled that 'a manager of a company possesses the most general and inclusive powers possessed by any officer of a corporation, and that unless his authority is specifically restricted it is coextensive with the powers of the corporation itself, and he has authority to do any act in its behalf which is usual and necessary in the ordinary course of the company's business, or which he is held out to the public as having authority to do.* The fact that he occupies the position of manager implies his authority to do anything that the corporation itself may do, so long as the act done pertains to the ordinary business of the corporation. 14A C. J., p. 359, Sec. 2221; *Robinson* v. *Moark-Nemo Consolidated Mining Co.*, 178 Mo. App. 531, 539, 163 S. W. 885; *Concrete & Steel Const. Co.* v. *National Asphalt Refining Co.*, (Mo. App.) 2 S. W. 2d 157.' *Buffalo Trust Co.* v. *Producers' Exchange*, 224 Mo. App. 199, l. c. 208, 23 S. W. 2d 644, l. c. 649. See, also, *Gate City Building & Loan Ass'n* v. *National Bank of Commerce*, 126 Mo. 82, 28 S. W. 633, 27 L. R. A. 401, 47 Am. St. Rep. 633; *Farm & Home Savings & Loan Ass'n of Missouri* v. *Stubbs*, 231 Mo. App. 87, 98 S. W. 2d 320; *Rosenbaum* v. *Gilliam*, 101 Mo. App. 126, 74 S. W. 507" (Italics ours).

Further in the opinion it was said:

> "As previously stated, the Kansas City customers of appellant dealt only with that branch office; merchandise was sent to it and then later sold to the customers, the same as if it had been an independent jobber."

And, still further in the opinion, it was said:

> "Where a corporation puts the agent forward as a general agent or manager or places him in a position where others are justified in the belief that his powers are general, the restrictions that may be imposed privately on the agent are immaterial, except

as between the corporation and the agent, and cannot affect the rights or remedies of third parties dealing with the agent who have no knowledge of such restrictions. *Southwest Mo. Elect. R. Co.* v. *Missouri Pac. R. Co.*, 110 Mo. App. 300, 85 S. W. 966; *Farm & Home Sav. & Loan Ass'n* v. *Stubbs, supra*; *Rosenbaum* v. *Gilliam, supra.*"

The case last cited is the most recent pronouncement of the Supreme Court of Missouri in respect to the authority of an agent upon whom his principal has conferred the title "manager" and, like the instant case, it involved the authority of the manager of a branch office, as distinguished from the manager of the home office. The case does not announce a new rule in Missouri. It is, instead, but a restatement of a rule long recognized and applied by the appellate courts of Missouri.[2]

The Forbes case cannot be distinguished from the instant case. In each case the agent involved was manager of a branch office. In the Forbes case, the principal had placed in possession of the bank an instrument in respect to the agent's authority and, in the instant case, the principal had placed in the hands of petitioner a telegram which referred him to their local manager for further information in respect to the authority of a manager in a remote territory. In the Forbes case, the instrument did not expressly recognize authority in Einhorn to make use of company funds by depositing them to his

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[2]*Kelso* v. *Lincoln National Life Ins. Co.*, 227 Mo. App. 184; *State* v. *Hemenover*, 188 Mo. 381; *Thompson* v. *Insurance Co.*, 169 Mo. 12; *James* v. *Mutual Reserve Ins. Co.*, 148 Mo. 1; *Springfield Steam Laundry Co.* v. *Traders' Ins. Co.*, 151 Mo. 90; *Bacon Piano Co.* v. *Metcalf Jewelry & Music Co.*, 225 Mo. App. 463; *Buffalo Trust Co.* v. *Producers' Exchange No. 148, California, Mo.*, 224 Mo. App. 199; *Robinson* v. *Moark-Nemo, etc., Mining Co.*, 178 Mo. App. 531, 539; *Concrete & Steel Construction Co.* v. *National Asphalt Refining Co.*, (Mo. App.) 2 S. W. 2d 157; *Farm & Home Savings & Loan Ass'n* v. *Stubbs*, 231 Mo. App. 87.

personal account, nor in the instant case did the telegram expressly recognize authority in Mr. Evans to confirm the genuineness of a bond written by a manager in a remote territory. But, in each case, there was a recognition of authority sufficient to permit a reasonable inference that the agent was invested with the general conduct and control of the company's business in the particular locality, with full authority to consummate the impending business.

The Forbes case was disposed of by the majority opinion of the Circuit Court of Appeals as follows (R. 219):

> "In the course of the opinion there are general expressions stating the rule set out above applicable to the apparent or implied powers of a general agent. It is obvious that the nature of the question concerning the implied authority of a branch manager which has arisen in this case was not particularly called to the attention of the court in that case. The case cannot, therefore, be relied upon as an authority in this case where the exact point is in issue. *Had the court's attention been directed to the distinction it would no doubt have been more precise in its statement*" (Italics ours).

It thus seemed to be the impression of the majority of the judges of the Circuit Court of Appeals that the Supreme Court of Missouri, in the Forbes case, loosely expressed the law of Missouri.

Judge Gardner viewed the Forbes case differently. In his dissenting opinion, he said (R. 223):

> "In the Forbes case, the manager was the manager of a branch office. Here, the manager was referred to by the company as 'our manager.' I think, therefore, it could not properly be said as a matter of law that there was no evidence of the execution and delivery of the note and bond."

The fundamental error of the majority opinion is the assumption that the function of a branch office of a corporation is limited to business originating in the territory served by that office. There was not one word of evidence that its function was thus limited and, indeed, no such limitation was brought to the attention of petitioner. The purpose of establishing branch offices is to provide a place for local patrons to transact business with the company regardless of the place where the particular business may have arisen. Petitioner was a resident of Kansas City, Missouri. He was referred by respondent to its local manager for further information in respect to the authority of a manager in a distant territory. Clearly, he had the right to assume that if the local manager could pass upon the authority of a manager in a distant territory, he could, unless otherwise informed, likewise pass upon the genuineness of a bond purportedly executed by that manager. Mr. Evans viewed the matter in exactly the same manner. He stated that he was familiar with the signature and that he knew it was genuine. He did not tell petitioner that he was without authority. On the contrary, he went from his office to the office of the First National Bank of Kansas City to give petitioner the assurances which led to the consequent loss. It was clearly a question for the jury, and not for the District Judge, to say whether respondent's manager had actual or implied authority to confirm the validity of the bond.

(c)

The Declarations of W. R. Evans, Manager of Respondent's Kansas City Office, Were Admissible in Evidence and Did Not Violate the Hearsay Rule.

In the majority opinion, it is stated (R. 213):

"When considered only in connection with the execution of the bond Evans' declarations were mere conclusions and clearly hearsay, and they were prop-

erly stricken on that ground. He was not produced as a witness. He did not testify under oath, and there was no opportunity to cross-examine him. The conversation at the bank was not in the presence of the defendant, nor of any of its representatives other than Evans."

In the dissenting opinion, it is said (R. 222):

"Evans is not to be considered as an expert witness giving an opinion, but as an officer making binding admissions. He told plaintiff that the bond was signed by defendant's authorized agent and that it represented its binding obligation. Evans was the only officer of the defendant participating in this transaction in Kansas City. What he said about this transaction was admissible against the defendant, and, hence, the testimony of the plaintiff and of Mr. Riley should not have been stricken. This testimony established, *prima facie* at least, the execution of the bond by an authorized agent of the defendant."

In the case of *Shelton* v. *Wolf Cheese Co.*, 338 Mo. 1129, decided by the Supreme Court of Missouri, it was said:

"Whatever is said by an employee or agent of a private corporation in respect to and in the course of any transaction, or in connection with and accompanying and relating to the performance of any act, in which he is then engaged, 'or, in the language of the old writers, *dum fervet opus*,' while he, acting within the scope of his employment or authority, is carrying on or transacting the business, or doing the work, of his master or principal, is admissible in evidence, as an admission or declaration, against the principal (the Latin phrase, *supra*, is translated 'while the work glows' or 'in the heat of action'); * * *."

The above stated rule is well established in Missouri. *State* v. *Armour Packing Co.*, 173 Mo. 356; *Whittington* v. *Westport Hotel Operating Co.*, 326 Mo. 1117; *Philibert* v. *Benjamin Ansehl Co.*, 342 Mo. 1239; *Green* v. *American*

Life & Accident Ins. Co., (Mo. App.) 93 S. W. 2d 1119; *Simpson Adv. Service Co.* v. *Manufacturers & Merchants Ass'n,* 330 Mo. 1049.

The declarations of Mr. Evans were made in the course of, and in connection with, the business that he was then transacting for his principal. It has heretofore been shown that as manager of the Kansas City office he was acting within the actual or apparent scope of his authority. His declarations were, therefore, binding upon his principal and were admissible in evidence to establish, *prima facie,* the validity of the guaranty bond.

(d)

A Prima Facie Case Was Made under the Missouri and Federal Statutes Relating to Proof of Disputed Writings.

Section 1751, Missouri Revised Statutes, 1929, provides:

> "Comparison of Disputed with Genuine Writings —Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

There is a federal statute containing similar provisions.[3]

The Missouri statute has been construed by the Supreme Court of Missouri in the case of *Sanders* v. *North End Building & Loan Ass'n,* 178 Mo. 674, where, in support of a plea of *non est factum,* the defendant offered specimens of the genuine signature. It was held that it was a question for the jury to determine whether the disputed signature was genuine by comparing it with the specimen even if there had been no other evidence in the case. In that case, the Supreme Court said:

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[3]Title 28, United States Code, Annotated, Sec. 638.

"The case made by the plaintiff in chief was by no means clear or strong or convincing, but there was evidence sufficient to take the case to the jury. *The defendant identified and offered in evidence the various checks signed by Charles James, and thereby afforded the jury a legitimate basis of comparison by which to judge for themselves whether the notes in suit were signed by James or not.* Formerly only such writings as were properly in a case to prove some issue in the case or for a legitimate purpose and having a direct bearing upon the case could be used as a basis of comparison by which to judge the genuineness of a paper or writing or signature that was in question in the case (*State* v. *Thompson*, 132 Mo. l. c. 325). But afterwards this rule was changed by statute, as it is now provided by Section 4679, Revised Statutes, 1899, as follows:

> 'Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.'

"This provision of the statute was applied upon the second trial of the *Thompson case, supra*, and it was contended that the act could not be constitutionally so applied, because it was passed after the commission of the act of the defendant then on trial, but this court held the contention to be untenable (*State* v. *Thompson*, 141 Mo. l. c. 416).

"This act was also considered by the St. Louis Court of Appeals in *Bank* v. *Hoffman*, 74 Mo. App. 203, and it was pointed out by Bond, J., in that case, that the act is a literal copy of the English act of 1854, and that, under the English act, it was the rule that the jury was entitled to make a comparison, and to judge therefrom as to the genuineness of the writing in dispute.

"The defendant, therefore, furnished the jury such a basis of comparison by introducing the checks

signed by James that were conceded to be genuine, and the jury, therefore, had substantial evidence upon which to base a verdict, even if there had been none in the case before" (Italics ours).

See, also, *State* v. *Pace*, 269 Mo. 682, and *State* v. *Thompson*, 141 Mo. 408.

The Circuit Court of Appeals disposed of this contention by holding (1) that the specimen of the genuine signature was not sufficient to make a question for the jury for the reason that the guaranty bond was not properly in evidence, and (2) that even if it was competent to prove the signature, there had been no showing that respondent delivered the guaranty bond and that an instrument is not executed unless it is both signed and delivered.

In any case where a comparison of signatures is availed of to prove execution of a written instrument, the instrument is not properly in evidence until after the comparison is made.[4] It is the introduction of the genuine signature that puts the instrument in evidence. *Sanders* v. *North End Building & Loan Ass'n, supra.*

On the question of delivery, the record shows that the guaranty bond was in the possession of F. E. Colvin, the obligee therein, when it was first presented to petitioner (R. 37-38). Mr. Colvin then delivered it to the trust department of the First National Bank of Kansas City in pursuance of the escrow agreement (R. 84, 85, Exh. 5). It was there inspected by Mr. Evans, Manager of respondent, and was confirmed in all respects (R. 52, 103). Moreover, the letter of March 27, 1935, purported to confirm the bond and Mr. Evans, respondent's manager, declared that the letter was genuine and came from respondent's home office. If the majority opinion of the Circuit Court of Appeals is correct in holding that the presumption of delivery disappears where execution

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[4]Compare *Broadway Bank of Kansas City* v. *Stroud et al.*, (Mo. App.) 51 S. W. 2d 555, where the instrument was received in evidence before the specimen signature.

of the instrument is denied under oath, we submit, nevertheless, that there was ample evidence of delivery. The declarations of respondent's manager that the bond was valid and "like money on the barrel-head," as well as the letter of March 27, 1935, implied that it had been delivered. Mr. Colvin's possession of the bond was a circumstance tending to show that it had been delivered to him by respondent.[5] Delivery of an instrument, like any fact in issue, may be shown by circumstantial evidence.[6]

(e)

The Effect of Rule 8(c) of the Federal Rules of Civil Procedure on the Burden of Proof.

The Circuit Court of Appeals held that the Missouri statute placing the burden of proof upon petitioner to prove execution of the guaranty bond was applicable notwithstanding the provisions of Rule 8(c) of the Federal Rules of Civil Procedure. Judge Gardner, in his dissenting opinion, adopted the contrary view and cited the recent case of *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. 2d 253, decided by the Circuit Court of Appeals for the Eighth Circuit. Rule 8(c) provides:

> "(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consider-

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[5]*Hurt* v. *Ford*, 36 S. W. 671, judgment reversed 142 Mo. 283, 44 S. W. 228; *Houghton* v. *Jacobs*, (Mo. Sup.) 246 S. W. 285; *Earle* v. *Woodruff*, (Mo. App.) 274 S. W. 107; *Singleton* v. *Mann*, 3 Mo. 464. Compare *Meredith* v. *Brock*, 322 Mo. 869, cited in the majority opinion of the Circuit Court of Appeals, where possession of the instrument remained with the alleged maker.

[6]*Gardner* v. *Crenshaw*, 122 Mo. 79; *Coffman* v. *Fleming*, 301 Mo. 313; *Slabon* v. *St. Louis Car Co.*, (Mo. App.) 138 S. W. 2d 673; *McDonald* v. *Kansas City Gas Co.*, 332 Mo. 356, 59 S. W. 2d 37; *Fryer* v. *St. Louis-San Francisco Ry. Co.*, 333 Mo. 740, 63 S. W. 2d 47; *Sills* v. *Burge*, 141 Mo. App. 148, 124 S. W. 605.

ation, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

In the case of *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. 2d 253, 258, the court said:

> "Regardless of what may be thought to be the implications of Rule 8(c) with respect to the burden of proof of contributory negligence as a matter of procedure, we are satisfied that the rule does not have the effect of casting upon a defendant the burden of disproving the plaintiff's freedom from contributory negligence, where under the applicable state law that is an essential element of the plaintiff's cause of action which must be proved if he is to prevail."

The question is, therefore, whether the Missouri statute affects the cause of action or merely the mode of proving it. If it has the former effect, it is a matter of substantive law and if it has the latter effect, it is merely a procedural matter.

Under the law of Missouri, in an action on a contract, the burden is upon the plaintiff to prove the cause of action alleged in his petition.[7] The only effect of the statute is to relieve plaintiff of the burden of proving execution of the contract in the absence of a plea of *non est factum*.[8] But even though the burden of proof is always upon plaintiff to prove the cause of action alleged, the burden of the evidence in respect to certain issues may

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[7]*Lampe* v. *Franklin American Trust Co.*, 339 Mo. 361; *Robertson* v. *Shepherd*, 165 Mo. 360, 65 S. W. 573; *International Textbook Co.* v. *Yount*, 129 Mo. App. 247, 108 S. W. 124.

[8]*State ex rel. City of Maplewood* v. *Southern Surety Co.*, 323 Mo. 150, 19 S. W. 2d 691.

shift to defendant.[9] And where plaintiff has offered evidence sufficient to show, *prima facie*, the genuineness of a written instrument, the burden of the evidence shifts to defendant.[10] But the burden of proof, or risk of non-persuasion, remains with plaintiff throughout the proceeding, and never shifts.[11]

Applying these principles in the instant case, it is clear that the Missouri statute does not change, or inhere in, the cause of action because, as heretofore shown, it does not affect the burden of proof which always rests upon the plaintiff. It merely provides the mode of raising the issue of execution of a written instrument.

Under Rule 8(c), the burden of the evidence in respect to the alleged forgery was upon respondent. It was nothing more than a matter of procedure at the trial where, as stated before, the risk of non persuasion, or burden of proof in the strictest sense, was, at the beginning, and always remained, upon petitioner.

(f)

The Importance of the Question Presented.

The decision of the Circuit Court of Appeals, if allowed to stand, will seriously affect the branch office system of doing business. It is indisputable that there have grown up in this country large business enterprises, usually having their principal offices in some large city with numerous branch offices in many other states in the

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[9]*Campbell* v. *Terminal R. Ass'n of St. Louis*, 126 S. W. 2d 915; *Cluck* v. *Abe*, 328 Mo. 81, 40 S. W. 2d 558; *Connole* v. *E. St. Louis & S. Ry. Co.*, 340 Mo. 690, 102 S. W. 2d 581; *State ex rel. Stevens* v. *Arnold*, 326 Mo. 32, 30 S. W. 2d 1015; *McCloskey* v. *Koplar*, 329 Mo. 527, 46 S. W. 2d 557; *Clapper* v. *Larkin*, 343 Mo. 710, 123 S. W. 2d 27; *Downs* v. *Horton*, 287 Mo. 414, 230 S. W. 103; *Bond* v. *St. Louis-San Francisco Ry. Co.*, 315 Mo. 987, 288 S. W. 777.

[10]*Lampe* v. *Franklin American Trust Co.*, *supra*.

[11]*Id.*

Union. In each unit or branch of the business is placed in authority one who is generally designated the "manager" who is responsible for the conduct of the company's business in that locality. To permit a corporation doing business in this manner to escape liability for the acts of its manager on the ground that he is not one of the principal officers of the corporation and that he must have actual express authority to do the particular thing in question would be going far afield from reality, because, for all practical purposes, the manager of a branch office is the head of the corporation in that locality. *James H. Forbes Tea & Coffee Company* v. *Baltimore Bank, supra.*

Under the decision of the Circuit Court of Appeals, a local patron would be bound to inquire of the home office whether the local manager had authority to transact a particular kind of business. A building contractor with its principal office in Kansas City, about to undertake a construction job in Florida, could not be sure that the Kansas City manager of a surety company had authority to write his performance bond and would be compelled to inquire of the home office.

The purpose of the branch office system is to contact patrons in many localities. It is not confined to transactions originating in any particular locality. For all practical purposes, respondent's Kansas City office was a portion of its home office established in Kansas City to accommodate patrons desiring to transact business there.

Conclusion.

In conclusion, it is respectfully submitted that the Circuit Court of Appeals has decided important questions of local law in a manner in conflict with local decisions and that, accordingly, the decision should be reviewed by this Court.

Respectfully submitted,

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